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IN THE

SUPREME COURT OF THE UNITED STATES

No:

October Term, 1982

RICHARD N. KATZMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF PENNSYLVANIA

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THE QUESTIONS PRESENTED FOR REVIEW

Did the court below err in refusing to grant a new trial to defendant Katzman where the only evidence supporting his conviction was seized from his person upon a public street under color of a search warrant that described, in its affidavit of probable cause, only a basis for a search of premises believed to be under his control but contained no basis upon which the issuing authority could conclude that contraband or evidence would be found upon the person of Katzman, and where the record is devoid of any evidence that would otherwise support the search of Katzman upon a public street?

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Petitioner prays that a writ of certiorari issue to review the judgment of the Superior Court of Pennsylvania, entered in the above-entitled case on February 5, 1982.

Opinions Below

The judgment order of the Superior Court of Pennsylvania, filed on February 5,

1982, is not yet reported and is reprinted in Appendix A along with the opinion of the Honorable Ralph J. Cappy, Court of Common Pleas of Allegheny County, Pennsylvania, upon which the Superior Court of Pennsylvania relies.

Jurisdiction

The judgment of the Superior Court of Pennsylvania was entered on February 5, 1982. On May 28, 1982, the Supreme Court of Pennsylvania entered an Order Denying Petitioner's Petition for Allowance of Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Statutes Involved

The Fourth and Fourteenth Amendments to the Constitution of the United States are involved herein and set forth in Appendix B, infra.

Statement of the Case

This criminal prosecution was instituted by the arrest of the petitioner, Richard

Katzman (hereinafter "Katzman"), on October 21, 1979, by various troopers of the Pennsylvania State Police. The arrest was preceded by the attempt by said police officers to execute a search warrant for the person of Katzman. Subsequent to the execution of the search warrant for the person of Katzman and his ensuing arrest, said police officers executed a search warrant for certain premises located at 203 Roup Street, Pittsburgh, Pennsylvania.

The search warrant for the person of Katzman was issued on October 21, 1979, on the basis of an affidavit of probable cause drafted and executed by Trooper Charles G. Wilker and sworn before the issuing authority, Andrew Kurta. The affidavit of probable cause utilized in support of the search warrant for Katzman's person is identical in all respects to that utilized in support of the search warrant issued for the premises

located at 203 Roup Street, Pittsburgh, Pennsylvania.

The thrust of the subject affidavit of probable cause is that Katzman was conducting a telephone bookmaking business at 203 Roup Street, Pittsburgh, Pennsylvania. Said affidavit of probable cause states that, beginning on October 13, 1979 and continuing on October 14, 19, 20 and 21, 1979, surveillance was maintained at Katzman's residence and at 203 Roup Street, during which time Katzman was observed walking on the street and driving his car from his residence to the Roup Street location. The affidavit of probable cause further states that an informant placed bets with Katzman by telephone during the time Katzman was known to be inside the premises on Roup Street.

On October 21, 1979, after having obtained the search warrants for the person

of Katzman and for the premises located at 203 Roup Street, the troopers, dressed in street clothes, stationed themselves across the street from the Roup Street premises and waited for Katzman to exit. At approximately 4:40 PM, Katzman exited the Roup Street premises carrying a folded newspaper under his arm. Nothing unusual was observed by the troopers relative to the newspaper which Katzman carried.

Upon observing Katzman, the troopers announced that they were state police. Thereupon, Katzman began to run, with the troopers in pursuit, until he tripped over a fence and was captured in the rear of property located at 140 S. Negley Avenue. As a result of the chase and the fact that Katzman tripped over a fence, certain papers were observed scattered on the ground and were picked up by the police. After these papers were retrieved and examined, the troopers

determined that the papers consisted of line sheets, sheets containing bets and owe sheets. Thereupon, Katzman was placed under arrest for bookmaking.

Reasons for Granting the Writ

The Superior Court, in affirming without opinion the decision of the Court of Common Pleas of Allegheny County, Criminal Division, decided the question presented for review in a manner not in accord with the applicable decisions of this Court and various United States Courts of Appeals.

Katzman contends that he is entitled to a new trial since the state police had no legal justification for conducting a search of his person upon the public street after he had exited the premises located at 203 Roup Street, Pittsburgh, Pennsylvania. Throughout the proceedings in the Courts below, the Commonwealth has maintained that the search of Katzman's person and subsequent

seizure of documents introduced as evidence at his trial, over defense counsel's objection was conducted pursuant to a valid search warrant for his person.[1/]

Based upon the contentions of the Commonwealth and Katzman, Judge Cappy, at the suppression hearing, correctly determined that the issue before him was whether the

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1/ At no time during this case has the Commonwealth asserted that the search was incident to a valid arrest or that, apart from those facts stated in the affidavit of probable cause, there was an independent basis for conducting a search of Katzman's person. Clearly, the record in this case would not support such an assertion since Katzman was not observed committing any offense as he exited the Roup Street premises prior to the execution of the search warrant for his person. Since the offense charged in this case, Bookmaking, 18 P.S. § 5514, is a misdemeanor, an arrest was improper unless the arresting officers observed the offense being committed in their presence. Pa.R.Crim.P. 101(a). As the record indicates, the police made no such observation in this case.

search warrant for the person of Katzman was based upon a legally sufficient showing of probable cause, under the Fourth Amendment of the United States Constitution, as incorporated into the Fourteenth Amendment, and Article I, Section 8 of the Pennsylvania Constitution, to justify the search of Katzman on October 21, 1979. After examining each statement of fact set forth in the affidavit of probable cause, Judge Cappy made the following finding:

> "... there can be no doubt that the defendant, Richard Katzman, was involved in a cleverly devised bookmaking operation involving the use of telephone call-forwarding apparatus, that during the period involved herein, Katzman unquestionably received bets by telephone, that Katzman's principle residence was located at 220 S. Negley Avenue, and that on those occasions when bets were placed with Katzman by the informant herein, Katzman was known to be at 203 Roup Street."

Significantly, Judge Cappy did not conclude,

as a result of his line by line analysis of the affidavit of probable cause, that Katzman was likely to be carrying on his person any tangible fruits of the bookmaking operation. Since neither the informant's statements nor the police surveillance, as reflected by the affidavit of probable cause, would enable a magistrate to make a determination that any item of contraband would be found on Katzman's person, Judge Cappy determined that it was reasonable to infer such fact:

> "Common sense dictates but one conclusion, that in view of the surreptitious nature of Katzman's operations, combined with frequent comings and goings of the defendant from the Roup Street location where he was unquestionably receiving bets by phone, the bookmaking paraphernalia was either located at the Roup Street residence or, if removed from the location, removed by the only individual ever seen entering and exiting those premises - - Katzman himself. It would be stretching reality to the point of absurdity to assume that the bets themselves were not recorded but were neatly memorized and secreted in Katzman's mind. (Emphasis supplied)

However, Judge Cappy's inference as to the existence and location of the bookmaking paraphernalia is based on conjecture and surmise. Obviously, Judge Cappy could only surmise, on the basis of the affidavit of probable cause, that the contraband could only have been located in the residence or on the person. No case has suggested that constitutional proscriptions against unreasonable search and seizures were met as long as the location of the suspected contraband was narrowed down to one of several possibilities.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [Emphasis added]

This Court has recently reaffirmed the traditional view that the Fourth Amendment was designed to protect the privacy and security of persons and, in so doing, reiterated the principle that

> "In the ordinary case ... a search of private property must be both reasonable and performed pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in the light of surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.
>
> * * *
>
> By requiring that conclusions concerning probable cause and the scope of a search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime,' Johnson v. United States, 33 U.S. 10, 14 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948), we minimize the risk of unreasonable assertions of executive authority. See McDonald v. United States, 335 U.S. 451, 455-456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948)." Arkansas v. Sanders, ___ U.S. ___, 99 S.Ct. 2586, 2589, 2590 (1979).

Thus, the constitutional scheme requires that search warrants be issued only after the police officer or affiant articulates, in an affidavit of probable cause, his reasons for wanting to conduct a search and supports what is said by a sworn oath. Thereupon, the statements in support of probable cause are considered by a neutral and detached magistrate. See e.g., Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031 (1971).

In addition to the warrant procedures specified above, the federal cases are unanimous in holding that probable cause is not established if the affidavit of probable cause fails to establish, by the recital of underlying facts and circumstances, that the fruits of a crime or evidence thereof will be found at the place to be searched. See e.g., United States v. Rettig, 489 F.2d 418, 422-432 (9th Cir. 1978); United States v. Gramlich, 551 F.2d 1359, 1362 (5th Cir.

1977); United States v. Bailey, 458 F.2d 408 (9th Cir. 1972); United States v. Flanagen, 423 F.2d 745 (5th Cir. 1970); United States v. Whitlow, 339 F.2d 975, 980 (7th Cir. 1964).

Based upon the foregoing analysis and authorities, it is clear that the search warrant for the person of Katzman is legally insufficient and requires suppression of the items seized. First, it is obvious from a reading of the affidavit of probable cause that the police affiant informed the issuing authority only that a telephone bookmaking business was being conducted at 203 Roup Street. No underlying facts or circumstances suggesting that any item of contraband or evidence would be found on the person of Katzman were described in the affidavit of probable cause or presented to the issuing authority. If anything, the affidavit of probable cause negated that inference by the following recitals:

(1) The affidavit recites that informant's information to the police merely indicate that bets were being placed over the telephone, but did not state that said bets were being recorded on rice paper or in any other form;

(2) The affidavit recites that affiant has known that Katzman was involved in bookmaking for a period of six years and, on one occasion was the subject of a search, but does not state that said search revealed the existence of rice paper, line sheets or any other paraphernalia common to a bookmaking business;

(3) The affidavit recites that the police conducted surveillance of Katzman on October 14, 19, 20 and 21, 1979, but does not state that on any of those occasions he was observed carrying anything on his person such as rice paper, line sheets, owe sheets or any other paraphernalia common to a bookmaking business;

(4) The affidavit, based on the aforesaid recitals, concludes that Katzman was conducting the telephone bookmaking operation from inside the premises at 203 Roup Street.

Applying the analysis set forth above, the United States Court of Appeals, Sixth Circuit, recently ordered that a firearm be suppressed as evidence where it was seized pursuant to a search warrant whose affidavit of probable cause failed to specify any information relating to the existence or location of the firearm. In its opinion on rehearing, the Court of Appeals states:

> "In our previous opinion we found that the warrant authorizing a search for firearms was valid. We were under the impression that the affidavit attached to the search warrant provided for probable cause for the search for the firearm. Upon rehearing and review of this question, we now find that the affidavit upon which the warrant was granted made no mention of any facts about firearms. The affidavit cannot be read as attempting to provide probable cause for the

> search for a firearm. In addition, there is no indication from the record or the briefs on rehearing that the officers seeking the warrant brought any information concerning existence or location of a firearm to the attention of the magistrate who issued the warrant. The lack of probable cause in the affidavit vitiates the search and seizure for the firearm unless the search comes within an exception to the warrant requirement." United States v. Andrews, 612 F. 2d 235 (6th Cir. 1980) (Emphasis supplied)

Under the foregoing circumstances, the issuing authority, even if applying the common sense approach of United States v. Ventresca, 380 U.S. 102, 198 (1965), could not make a finding that a search of Katzman's person would yield anything whatsoever. For him to have done so was improper under the -cited cases and requires suppression of said evidence.

Conclusion

Based on the foregoing and the record as a whole, it is respectfully requested that a Writ of Certiorari to the Superior Court of Pennsylvania be issued for the special and important reasons stated herein.

Respectfully submitted,

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